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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ELISSA JHUNJHNUWALA et al., Plaintiffs and Appellants, v. JAMES FERDINAND CARILLO, Defendant and Respondent.	B239528 (Los Angeles County Super. Ct. No. NC050505)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith A. Vander Lans, Judge. Reversed and remanded with directions.

Ayscough & Marar, Sidney Lanier and Brent Ayscough for Plaintiffs and Appellants.

Cole Pedroza, Kenneth R. Pedroza, Tammy C. Weaver; Peterson Bradford Burkwitz, George E. Peterson and Richard Barrios for Defendant and Respondent.

Plaintiffs and appellants Elissa Jhunjhnuwala, Jason Nowland, Brandy Ascough, and Brian Ascough[1] appeal from a judgment and post-judgment order following a jury trial in favor of defendant and respondent James F. Carillo, M.D., in this consolidated action for medical malpractice and wrongful death. Plaintiffs contend the trial court should have granted their motion for a new trial on the grounds of attorney and juror misconduct. Specifically, plaintiffs contend Carillo's attorney committed misconduct during closing argument by arguing the following: 1) plaintiffs did not owe any money for their mother's medical expenses, which had been paid by Medi-Cal and Oregon's Medicaid program; 2) inflammatory photos were displayed in violation of a trial court order; 3) a record of vital sign trends was available from the monitor used during the operation, although none was produced in discovery; 4) nurses are "truth-tellers"; 5) misrepresentations as to the evidence; and 6) maligning opposing counsel's professionalism. In addition, plaintiffs contend the trial court abused its discretion by excluding evidence from juror declarations, and the juror misconduct included: 1) concealing bias in voir dire; 2) prejudging the case; 3) expressing anti-gay prejudice; 4) acting to protect Carillo's reputation; and 5) threatening physical violence during deliberations.

We conclude the remarks during closing argument, which suggested plaintiffs did not owe any money for their mother's medical expenses because the expenses were paid by Medi-Cal and Oregon's Medicaid program, directly violated California law and the trial court's express order, and thus, constituted misconduct. Statements made by jurors during deliberations were erroneously excluded in connection with the motion for a new trial. Therefore, we reverse the order denying the motion for a new trial with directions.

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[1] Because more than one party shares the last name Ascough, the parties will be referred to individually by their first names.

FACTS AND PROCEDURAL BACKGROUND

Operation and Discovery Proceedings

Fifty-nine-year-old Kimi Ascough fell at home on January 25, 2007, suffered a broken arm and was temporarily unconscious. She woke with blood on her, presumably from a nose bleed. She was admitted to Community Hospital of Long Beach (the Hospital). The following day, Dr. Serena Nguyen-Young performed surgery on Kimi's arm under general anesthesia administered by Carillo. A Nihon Kohden monitor recorded Kimi's vital signs and the time of the measurements, including her heart rate, blood pressure, CO2, anesthesia gases, and pulse oximetry. The monitor can print two types of records: 1) a cardiac rhythm strip, which is a long, continuous strip of paper that includes a wave print and vital signs; and 2) a vital signs trend, which is a small square of paper that simply lists numbers summarizing the vital signs.

The surgery was successful. Carillo removed the endotracheal tube and threw it out. Surgical assistant Gregory Froehlich said, "Oh, look." Carillo saw that Kimi had vomited. Carillo suctioned her mouth, turned her body, tried to ventilate her using a mask, and noticed her heart rate dropping. A bronchospasm constricted Kimi's airway. He administered medications. He suctioned and obtained bloody mucous material. He inserted a new endotracheal tube. Surgical technician Paul Alba and Nurse Marivic Tran were also in the room. Alba left to get Nurse Patsy Nix to assist. Kimi had insufficient cardiac output. When Alba returned with Nix, Froehlich was performing CPR. Nix called Nurse Patricia Eckenroth to assist as well. Eckenroth arrived and began documenting Kimi's chart. Nguyen-Young returned to the operating room to offer assistance. Carillo administered medications to revive Kimi and used a defibrillator. Carillo noticed additional bloody mucous in the endotracheal tube, so he exchanged it for a clean tube. Kimi was moved to intensive care. Carillo, Nguyen-Young, Tran, Alba, Nix, and Eckenroth went with her. After Kimi was taken to intensive care, Alba returned to the operating room to clean it. Carillo, Nix, and Eckenroth also returned to the

operating room to complete documentation for the incident. Kimi had suffered severe brain damage. A peer-review meeting took place at the Hospital a few days later.

On November 28, 2007, Brandy, acting as guardian ad litem for Kimi, filed a complaint against Carillo, Nguyen-Young, and the Hospital for medical malpractice. On January 26, 2009, she filed an amended complaint.

Nix had her deposition taken in May 2008. Immediately after Kimi was placed in intensive care, Nix returned to the operating room with Carillo to fill out paperwork for the incident. Carillo wanted to review Kimi's heart rate and blood pressure at different times during the resuscitation effort. However, Nix and Eckenroth could not figure out how to make the monitor print the information. They left a message for the manufacturer's representative. Once the monitor is shut off, the information is lost. The monitor was used on several patients before the representative returned the call the next day. Kimi's information had been erased, so the company could not help. Nix testified that no printout was obtained from the monitor used in the operation and it was not possible to get one.

Eckenroth's deposition was taken in July 2008. She explained that the monitor strip is a long, continuous strip of paper about two inches wide. Eckenroth has been involved in many code situations in the emergency room and is very familiar with the code sheet that needs to be filled out. She stated, "I know that after a code is over, I can go in and retrieve the strip that has the vital signs that were taken during the code. But we don't usually keep them. We write the ones that are pertinent to the different situations . . . ." Eckenroth typically clears her monitor strips, so that the next strip will not have more than one patient on it. She is certain that she had the monitor strip. She retrieved the monitor strip out of the monitor that was used during Kimi's operation. She documented the times shown in the paperwork based on the information from the monitor strip. The monitor strip would have been thrown away, because they do not have a practice to keep it.

Tran's deposition was taken in July 2008. She did not document any activity after the operation, except to prepare an incident report. Plaintiffs' attorney asked if the

incident report had been produced in discovery, but the Hospital's attorney objected that it was a privileged document and instructed Tran not to answer questions about an incident report. Tran did not go back to the operating room with Eckenroth to obtain a printout from the monitor. She did not remember if she ever discussed whether Eckenroth was able to get a printout.

Plaintiffs propounded special interrogatories, including "Identify any records of any machine monitoring of Kimi Ascough during the OPERATION sufficient to satisfy a subpoena duces tecum, or attach a copy to YOUR answers to these interrogatories." The Hospital objected that the interrogatory was vague and unintelligible but responded, "All of the medical records pertaining to Kimi Ascough are contained in her chart from [the Hospital]." The Hospital offered to provide a copy of the chart if requested. The trial court granted plaintiffs' motion to compel further responses and awarded sanctions. In response to the court's order, the Hospital additionally responded, "After a diligent search and reasonable inquiry, in an effort to comply with this interrogatory, the responding party believes that the hard copy of any machine monitoring records have been discarded in the ordinary course of business." No monitor strips were included in the records produced to plaintiffs.

Carillo's deposition took place in January 2009. After delivering Kimi to intensive care, he returned to the operating room to get a printout of the data from the monitor in order to complete his charts. The printout from the monitor in the operating room would have provided numbers representing certain gases and the oxygen saturation level. Nix and Eckenroth were in the room. Carillo tried to print the data from the monitor, and it was not there. He asked what was going on. They responded that they did not know, but they were not able to get the data. Carillo was not able to retrieve the data, so he suggested the nurses call a representative to see if it could still be retrieved. His understanding was that the effort to retrieve the data was not successful. He confirmed Nix's testimony that the monitor failed to print. He did not know of any information printed from the monitor after the operation.

In February 2009, Kimi died as a result of her injuries. On June 18, 2009, the Hospital substituted new counsel. On June 22, 2009, plaintiffs filed a wrongful death complaint against Carillo, Nguyen-Young, and the Hospital. The actions were consolidated, and plaintiffs were substituted in to the medical malpractice action as Kimi's successors in interest.

The Hospital's new attorneys reviewed documents in preparation for trial, including the incident report that Tran had prepared. Attached to the incident report was a one-page document showing pieces of the monitor rhythm strip with Kimi's cardiac rhythms and vital signs recorded during the code. In May 2010, the Hospital provided plaintiffs with a copy of the document that showed portions of the rhythm strips and explained that it had been discovered attached to a privileged incident report.

In June 2010, plaintiffs filed a motion against Carillo and the Hospital to compel all documents relating to the monitor tape, or in the alternative, to strike their answers. The Hospital opposed the motion. The Hospital submitted the declaration of biomedical technician Christopher Wentzel, who is the staff member in charge of medical instrumentation. He declared that the monitor is capable of printing rhythm strips and vital signs as two distinct and separate print outs. It is the Hospital's custom and practice to turn the power off on the monitor after an operation. Thirty minutes after the monitor is powered off, the data is automatically erased as part of the standard operating procedure. Automatic erasure of data affects the ability to print. However, if the monitor had interpreted the patient's rhythm as abnormal, called an arrhythmia, some information is stored. If a stored rhythm is printed, the date and time of the event will print on the strip, not the date and time that it was printed. The bottom of a strip printed after the data was recorded says "recall." "Absent the recording of an arrhythmia rhythm strip, the Nihon Kohden monitor does not maintain a record of the entire history of a patient's surgery." The monitor interpreted Kimi's cardiac rhythms during the "code" as an arrhythmia. Therefore, monitor rhythm strips of Kimi's cardiac rhythms recorded during the code could be printed. The monitor strips have the word "recall" at the bottom, showing that the strips were not printed simultaneously as the data was recorded.

The Hospital submitted Eckenroth's declaration that her custom and practice is to print any abnormal cardiac rhythm recorded during a code in order to fill out resuscitation reports. The printout of the abnormal cardiac rhythm is submitted with the patient's medical chart. She declared that she completed the resuscitation report for Kimi after the code from handwritten notations made during the event, verbal information from other individuals present during the event, and her recollection of the monitor screen. After completing the report, she returned to the operating room and retrieved a print out of Kimi's trend vital signs, which were recorded during the code.

The Hospital submitted the declaration of its risk manager Susan Byrne, who discovered the monitor strips attached to the incident report. Byrne stated that documentation from a patient's medical file attached to an incident report is usually separated from the report and sent back to the patient's medical chart before the report is filed. Tran's incident report was presented to the nursing supervisor, who submitted it to the risk management office. Byrne did not notice any documents attached to the report that were part of the medical chart, so the document was filed. When discovery was requested, she did not review the incident report. The Hospital's new attorney requested a copy of the incident report, which is when Byrne discovered the document attached to the report showing pieces of the monitor strip.

Carillo also opposed the motion to compel production of documents. Carillo argued that plaintiffs had never filed a motion to compel discovery responses from him, he was not responsible for the Hospital's discovery responses, and the allegations against him were speculative. Carillo submitted a declaration that he had not seen any monitor strips until the Hospital produced them in May 2010.

Plaintiffs replied to both oppositions. A hearing was held on July 8, 2010. On July 9, 2010, the trial court denied the motion to compel. Plaintiffs settled with Nguyen-Young and the Hospital and dismissed the action as against them.

Trial

A jury trial began on October 25, 2011. Carillo sought to preclude the use of photos during opening statements, but the trial court ruled that plaintiffs could present the photos at issue. The court directed counsel to refer to the incident report simply as a report or a document and exclude any reference to "peer review."

In opening argument, plaintiffs informed the jury that Medi-Cal paid for more than $400,000 of Kimi's expenses and the State of Oregon had paid more than $160,000. Plaintiffs' attorney informed the jury that the state entities were entitled to reimbursement from the recovery in the case and characterized those expenses as the biggest part of the case. "We'll definitely be returning the money that was owed that paid for her health." Plaintiffs' attorney described smaller amounts that plaintiffs had personally paid for their mother's care and comfort, as well as an amount for loss of companionship.

Plaintiffs called Carillo as their first witness. His testimony about the monitor was mostly consistent with his deposition testimony. He stated that 30 minutes after the monitor is turned off, the data is erased, but they keep the monitor on at all times. He never turns it off. He presses a series of buttons to delete the last patient's data before using it for another case. Carillo disputed the accuracy of the times and other information that Eckenroth had written in Kimi's records. He disagreed with the information that Eckenroth had recreated for the period of time before she entered the operating room, as well as the information from the period of time that she witnessed the events. He clarified that when he returned to the operating room after taking Kimi to intensive care, Nix was in the room. He attempted to push a button to print the vital signs trend to complete the anesthesia chart. While he was discussing the monitor with Nix, Eckenroth came into the room with a document for Carillo to sign. He does not doubt that Eckenroth had the monitor tape as she claims, but he never saw it and she did not mention it. Carillo testified that it would be beneath the standard of care for someone to destroy a monitor strip. The information from the strip should be transferred to the anesthesia record, at which point, the strip could be discarded.

Carillo stated that in a routine case, he scrolls through information on the monitor to complete his charts and does not print the information. In this case, he wanted to look at a printed record. He explained that the monitor can print two types of printouts: the wave print and the vital signs trends. The monitor record is a wave print, which is like an EKG rhythm. The fragments attached to the report are from the wave print. The monitor can also print a tabular record called the vital signs trends. The vital signs trends are similar to a spreadsheet of the information at five minute intervals. Carillo was trying to print any kind of information from the monitor. The machine was empty, and he was not able to download anything.

Plaintiffs called the Hospital's risk manager Byrne. Byrne prepared and signed the Hospital's responses to plaintiffs' interrogatories. She contacted Nix and Wentzel for information to identify the records of any machine monitoring Kimi during the operation. Byrne did not remember her discussions with Nix or Wentzel. She also did not recall writing her response that the monitor strips had been thrown away in the ordinary course of business. After the Hospital hired new counsel, the four cardiac rhythm strips attached to the report came to Byrne's attention. Byrne asked the filing staff and everyone involved in the case if they knew who had attached the monitor strips to the report but could not figure it out.

Plaintiffs also called Eckenroth. Initially, Eckenroth could not recall whether she had the monitor strip. Plaintiffs' attorney read her deposition testimony stating that the times, pulse rate, and other information had come from the strip that she retrieved from the monitor, and her description of the monitor strip as a long strip of paper with the vital signs taken during the code. The strip is two inches wide in a continuous run that could be quite long. He also read her testimony in which she said the monitor strip would have been thrown away, because they don't keep it.

Eckenroth clarified at trial that she retrieved both the monitor rhythm strips and the vital signs trends. She does not preserve the vital signs trends. She retains the rhythm strips that are pertinent to the changes as the "code" progressed. She had rhythm strips that came out of the monitor, but she does not recall the particular strips that were

attached to the report. She would have written on strips that she mounted for a report. She does not know what happened to the rhythm strips that she had. She did not throw them away and she does not recall whether she gave them to Carillo. She is a meticulous person with careful handwriting, but she admitted that certain dosages of medications that she had written down were clearly incorrect.

Plaintiffs also called Nix. Plaintiffs' attorney read portions of Nix's deposition testimony about the monitor. At trial, Nix testified that she and Eckenroth turned the monitor on to retrieve a monitor strip, but the only information they could get was the vital signs trends. Byrne never contacted her to ask about monitor strips. Nix stated that she and Eckenroth used the vital signs trends for documentation, then Eckenroth threw the vital signs trends away. She has no idea who printed the strips that were attached to the report. She called the manufacturer's representative, because they could not get rhythm strips from the monitor. Some of the information Eckenroth wrote in her documentation was clearly incorrect.

Plaintiffs called Tran. Initially, Tran testified that Eckenroth tried to get a printout from the monitor but was unable to get one. Later, she admitted that she did not observe Eckenroth trying to print the strip and did not know what happened to it. When Tran filled out the incident report, she did not have any monitor strips.

Plaintiffs' expert witness Dr. Ronald L. Katz testified that Kimi was prematurely extubated. Kimi vomited and aspirated, which caused injury to her lungs and her ability to oxygenate her body, resulting in brain damage, and ultimately, her death. The care that Kimi received as a whole was below the standard of care. He noted that Kimi had asthma, obstructive sleep apnea, gastroesophageal reflux disease (GERD), hypertension, and mild anemia. She had a full dinner on the night of her injury. She had been given significant amounts of opiate medications in the hospital for pain, and at least one breathing treatment had been necessary. Katz noted that an endotracheal tube is the most common cause of bronchial spasm in asthmatic patients undergoing anesthesia. In his opinion, Carillo should have used a technique which did not require intubation.

Katz did not believe that Carillo performed all eight tests that he claimed to have done to determine whether it was appropriate to remove the endotracheal tube. If Kimi's protective reflexes had in fact returned, she would not have aspirated material into her lungs. She would have coughed it out. Katz testified that the timeline did not fit with the vital signs shown on the monitor strip segments. The surgery ended at 17:41. A patient is given pure oxygen prior to extubation. If the patient stops breathing, it takes eight minutes on average for the oxygen saturation level to drop from 99 or 100 percent to 90 percent. If Kimi aspirated at 17:46, as shown in her chart, then she would not have hypoxia at 17:49, as shown on the monitor strip fragment. The aspiration must have occurred closer to 17:41 to fit the time line. There was not sufficient time between the end of surgery and the aspiration for Carillo to have performed the eight tests that he claimed to have performed and two minutes of observation.

All of the plaintiffs testified. Jhunjhnuwala said the total amount of $527,368.57 owed to the states of Oregon and California had to be paid. Defense counsel asked Brandy if her relationship with her roommate was more than simply sharing rent by two girls. The trial court overruled plaintiffs' objection, and Brandy testified that they have been domestic partners for more than ten years.

In closing argument, plaintiffs' attorney suggested that Carillo returned to the Hospital early on the morning following the surgery, took the monitor strips from Kimi's medical records, and purged the monitor's data. Witnesses had covered up the missing strips or refused to volunteer information in order to prevent plaintiffs from discovering the truth. Plaintiffs' attorney argued that Carillo's attorney told the nurses what to say in their testimony. Eckenroth stated in her deposition that she had the rhythm strips, then came to court, and "made up something called vital sign trends." He said she was now claiming to have been talking about the vital sign trends in her deposition. He read her deposition testimony again, which clearly referred to the long, continuous rhythm strip. He noted that the expert witnesses had never heard of the vital signs trends record. He also pointed out discrepancies with Nix's deposition testimony, in which Nix said she worked with Eckenroth to obtain a printed record from the monitor without success.

Plaintiffs' attorney mentioned the stipulated amount for medical bills paid by the states of California and Oregon. In addition, plaintiffs were seeking expenses of $63,897.79 paid by Brandy and $21,055.79 paid by Jhunjhnuwala. Plaintiffs also claimed a few thousand dollars for funeral expenses, which had not yet taken place, and $250,000 in noneconomic damages to be divided equally among plaintiffs.

Prior to Carillo's closing argument, plaintiffs requested that the trial court order his attorney not to make any argument about the people or entities who would receive the award, if money was awarded. Carillo's attorney objected to the limitation but asked for specific directions from the court in the event the request was granted. Carillo's attorney wanted to argue that there was no evidence of any lien by the state entities and no evidence before the jury as to who would get what amount. He argued that all of the medical bills had been paid by Medi-Cal and Oregon's Medicaid program. There was no evidence of any lien or obligation to reimburse those entities, so if money was awarded by the jury for the amounts paid by those entities, there was no evidence that plaintiffs would repay those amounts. He contended that the amounts paid by Medi-Cal and Oregon's Medicaid program were not damages incurred by plaintiffs as Kimi's successors in interest.

Plaintiffs' attorney responded that the tortfeasor owes the damages and any dispute about distribution of the award would be decided separately. He warned it would be reversible error to argue that the amounts paid by Medi-Cal and Medicaid were not damages owed by plaintiffs. The trial court ordered Carillo's attorney not to argue anything about who would get paid what amount out of the judgment. He was not to say that the bills were not owed or that someone else would get the money awarded. Carillo's attorney responded, "I don't understand that." He argued the court's order amounted to directing a credibility finding that the money was owed and directing a verdict as to damages in the case. He continued to assert that he should be able to argue there was no evidence of liability for the amounts paid by Medi-Cal and Medicaid, and no evidence that the money awarded would go anywhere except in plaintiffs' pockets. Carillo's attorney argued strenuously that the amounts paid by Medi-Cal and Medicaid

were not losses sustained by plaintiffs, and plaintiffs were required to prove they had an obligation to reimburse those entities in order to recover from Carillo. He asserted that Medi-Cal or Medicaid could have independently pursued an action against Carillo to recover the medical expenses. He insisted, "Not to argue the point is a fraud. It is misleading the jury. And to hobble me so I can't argue any of this to the jury, I think is incorrect." Plaintiffs' attorney noted that the defense's argument was contrary to the law. The court ordered the defense not to argue that someone else is entitled to damages or how an award may later get divided. The court asked, "Is that clear enough, Mr. Petersen? I know you don't like it, sir, but is it clear?" Carillo's attorney had the court reporter read the order back, and he wrote it down.

In closing argument, Carillo's attorney noted plaintiffs' attorney had shown pictures of Kimi. He stated that pain and suffering was not part of the case, because the law does not allow it. He further stated: "It was [plaintiffs' attorney's] calculated decision to show you those pictures even though he knew that the law does not allow any recovery for pain and suffering of Kimi Ascough." He asked the jurors to recognize if the pictures had incited any sympathy or passion in them and disregard it.

He argued that plaintiffs' theory concerning concealment and destruction of evidence went nowhere. "That was testimony introduced by [plaintiffs' attorney], but it worked against him. . . . You would have to weigh all of the evidence that was introduced including the stuff that he brought in himself. He vouched for the credibility of those ladies. He brought them all here. He had you listen to their testimony. And it's only in his final summation that he attacks them as liars and perjurers." He later stated: "You know[,] being a lawyer for as long as I have, I've had a lot of witnesses on the witness stand, and I can tell you that nurses are truth tellers. They really are." Plaintiffs' attorney objected to this statement. Carillo's attorney repeated, "Nurses tell the truth." Plaintiffs' attorney objected again, and the trial court sustained the objection. Carillo's attorney stated: "You decide for yourselves whether nurses tell the truth." He claimed Nix and Eckenroth's testimony corroborated that Carillo tried unsuccessfully to get the monitor strips. He read a portion of Eckenroth's deposition testimony and claimed all of

her testimony in deposition and at trial had referred to the vital signs trends, but plaintiffs' attorney simply never understood her.

Carillo's attorney emphasized that witness Jennifer Cardona was Brandy's domestic partner and might have a personal stake in how the case was decided.

Carillo's attorney began, "Now I move to damages. . . . I'll try to summarize this more clearly than I otherwise would want to. [¶] First [of all,] I want to make it clear as to what I am not arguing. I am not arguing that someone else is entitled to the damages, the expenses that plaintiff claims were paid by Medi-Cal or the State of Oregon. I am not arguing that someone else is entitled to that damage, nor am I arguing as to how that later may be divided if you award - -." Plaintiffs' attorney objected, and at the same time, the trial court stated: "We discussed that." Carillo's attorney responded: "And I'm not arguing it." Plaintiffs' attorney stated: "It's the exact same thing using a negative. I cite this as misconduct." The court instructed Carillo's attorney, "Please don't do that." Plaintiffs' attorney requested that the trial court admonish the jury. The court began: "Disregard - -," but Carillo's attorney continued: "The State of Oregon's version of Medi-Cal is called Medicaid. And the California version of all this is of course Medi-Cal. Kimi Ascough had no insurance. She had no job. And apparently no means with which to purchase the insurance should she wish to have it. [¶] So all of these expenses were born[e] for her by Medi-Cal and Medicaid. A number of those expenses - -." The trial court interrupted, "Please move on. We discussed that. We discussed this earlier." Carillo's attorney started again: "Let me try it this way. The only expenses that the heirs claim to have paid out of pocket - -." Plaintiffs' attorney objected again. The court agreed with plaintiffs' counsel, "Yes. That's what we discussed earlier. We are not going to talk about it that way." Carillo's attorney responded, "I thought I was side-stepping things, but apparently I am not. [¶] All right. Let's talk about what is being claimed by way of damages."

The jury deliberated for a little more than a day, asked several questions, and requested information. On December 1, 2011, the jury returned a special verdict finding Carillo was not negligent and did not breach his fiduciary duty in his treatment of Kimi.

Ten jurors answered this was their verdict, while two jurors responded that it was not their verdict.

Motion for New Trial

On December 30, 2011, plaintiffs filed a motion for a new trial on the grounds of misconduct by jurors and defense counsel. Plaintiffs alleged certain jurors prejudged the case based on insurance implications, bias against gay people, and protection of Carillo's reputation. Physical threats disrupted deliberations. Defense counsel had committed misconduct by violating the trial court's order concerning Medi-Cal and Medicaid, insinuating that photos of Kimi were improperly shown, and misrepresenting plaintiffs' expert witness's qualifications. The new trial motion did not mention the monitor strips.

Plaintiffs submitted the declaration of Juror Jan Murdock. Murdock declared Juror Paul Therriault, who is a small business owner, repeatedly and emphatically said, "This case is the reason why my insurance rates are so high!" When Murdock asked if Therriault had made up his mind about liability before he got to the jury room, he said, "Yes!" Several other jurors agreed with him.

Murdock found Therriault's yelling to be intimidating during the deliberations. Murdock wanted to hear Carillo's testimony read back, but Therriault prevented her request. Juror Curly Brown backed up Therriault. Brown made an extremely offensive remark to Murdock. Murdock heard Brown and another juror express a strong anti-gay bias against Brandy. Brown stated he disapproved of gay people, because they live contrary to fundamentalist Christian beliefs.

Defense counsel stated repeatedly in closing argument that plaintiffs did not owe the money that was paid by California and Oregon for Kimi's medical care. Several jurors stated in deliberations that the medical bills had been paid and should not be awarded. Jurors said plaintiffs wanted money, even though the nature of the liens was not clear. The jury interpreted the issue to mean that since plaintiffs did not owe money, they were not entitled to any money. Based on defense counsel's comments in closing argument, Murdock was unclear about what money was owed. Juror Roy Wilson also

said, "If you vote for plaintiffs, you'll destroy this man's reputation and we cannot let that happen."

Carillo objected to Murdock's declaration on the grounds the statements were irrelevant, based on speculation and conjecture, lacked foundation, and, in most cases, constituted hearsay. The trial court overruled objections to the statements that Therriault dominated the jury, with the assistance of Brown, and that Brown used an offensive term to describe Murdock. The court sustained Carillo's objections to the remainder of Murdock's declaration.

Plaintiffs also submitted the declaration of Juror Gregg Heckethorn. Heckethorn corroborated that at the outset of deliberations, Therriault said Carillo should win and the children should get nothing. When Murdock asked Therriault if his mind was made up without deliberating, he said emphatically, "Yes!" He also said, "This case is the reason that my insurance rates are so high!" He repeated his view several times during deliberations and several other jurors agreed, including Brown. Therriault shouted and conducted himself in a physically menacing manner to Heckethorn. He would jump up, willing to physically fight Heckethorn. At times, Therriault put his hands on the table and raised himself up as if to pounce across at him. Juror Edward Cimo approached Heckethorn in the hallway and said, "This case is all about insurance, and this case is the reason that insurance rates are so high. I will not vote for anything that will raise my insurance rates." Comments by two jurors made it clear that they were biased against one of the plaintiffs because she is gay. Defense counsel's statements to the jury in closing argument made it clear that plaintiffs do not owe the States of Oregon and California for all of the medical bills that the states paid, which was a lot of money. Jurors commented in deliberations that the "kids did not owe that money." Therriault and Brown made these comments emphatically, but other jurors agreed with them. The other jurors believed the fact that the children did not owe the money to the states meant the children were not entitled to any money, and the jury should vote for Carillo. Several comments were made that if the jury voted for plaintiffs, it would destroy Carillo's practice. Juror H. believed Carillo took the tube out too early and wanted to discuss the evidence of that,

but only Murdock was interested in having that discussion. Therriault yelled that he would not discuss it, Brown agreed, and others went along.

Carillo filed objections to Heckethorn's declaration on the grounds the statements were irrelevant, based on speculation and conjecture, lacked foundation, and, in most cases, constituted hearsay. The trial court overruled the objection to statements that Therriault announced at the outset that Carillo should win and his mind was made up without deliberating. The court sustained Carillo's objections to the remainder of Heckethorn's declaration.

The trial court entered judgment in favor of Carillo on January 5, 2012. Carillo opposed the motion for new trial. He argued the statements during closing argument about Medi-Cal and Medicaid could not have had a prejudicial effect, because the jury never reached the issue of damages. Also, plaintiffs had already engaged in the same conduct by referring to Medi-Cal and Medicaid payments. Carillo argued that other claims had been waived for failure to object, and the verdict was based on the evidence, not bias or prejudice.

In support of his opposition, Carillo submitted Therriault's declaration that he was not biased in any way, considered the evidence thoughtfully and carefully, and never stated that he had his mind made up before deliberations began. No one shouted or called anyone names. Therriault did not intimidate anyone. The issue of insurance was never discussed during deliberations. He made one comment about his own business insurance after deliberations had concluded, which had nothing to do with this case. No juror expressed any opinion about homosexuality or domestic partnerships, and Therriault has no opinion on these issues. The issue of medical care costs never arose during deliberations, because the jury found Carillo was not negligent. The jurors never discussed whether plaintiffs owed money for Kimi's medical bills or who had paid the bills. At no time did any of the jurors comment on Medi-Cal or government entities. No juror ever made a statement about the effect of the case on Carillo's reputation or practice or said that a vote for plaintiffs would destroy Carillo.

Carillo submitted declarations from Jurors Roy Jean Wilson, Shannon Nazario, Iris Jean Hardy, and Sonya Turner that were nearly identical to Therriault's declaration. For example, all five jurors have no opinion on issues of sexual orientation or marital partner status.

Plaintiffs filed a reply and a further declaration of Murdock. Murdock declared the juror declarations provided by Carillo were false. The courtroom attendant and the court reporter could corroborate the yelling and shouting during deliberations. Therriault emphasized insurance at the beginning and throughout deliberations. In addition, Murdock provided further details and context for anti-gay remarks made by two jurors. Carillo objected to Murdock's entire further declaration, which the trial court sustained.

A hearing was held on February 9, 2012. Carillo's attorney argued he still did not understand the trial court's order concerning payments made by Medi-Cal and Medicare, but he tried to comply with it and wanted to address how much of the expenses claimed by plaintiffs were properly awardable. He argued that he was just signaling to the court and plaintiffs that he was not going to argue impermissible topics, when plaintiffs' counsel objected prematurely. He does not think he violated the court's order, although he also continues to think he should have been able to argue about the Medi-Cal and Medicaid payments. The court took the matter under submission. On February 15, 2012, the court denied the motion for a new trial. Plaintiffs filed a timely notice of appeal.

DISCUSSION

Motion for New Trial Based on Attorney Misconduct

Plaintiffs contend that the trial court should have granted their motion for a new trial on the grounds of attorney misconduct. We agree with plaintiffs that Carillo's closing argument constituted misconduct. To determine whether the misconduct was prejudicial, we review the entire record. However, the trial court erroneously excluded statements from juror declarations. Therefore, we reverse the order denying the motion

for a new trial with directions to the trial court to determine whether the misconduct was prejudicial in light of the entire record, including the juror statements.

A. Standard of Review

"Attorney misconduct is an irregularity in the proceedings and a ground for a new trial. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 870 (*Decker*).) . . . However, to preserve for appeal an instance of misconduct of counsel in the presence of the jury, an objection must have been lodged at trial and the party must also have moved for a mistrial or sought a curative admonition unless the misconduct was so persistent that an admonition would have been inadequate to cure the resulting prejudice. (*Cassim* [*v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 794-795 (*Cassim*)].) This is so because '[o]ne of the primary purposes of admonition at the beginning of an improper course of argument is to avoid repetition of the remarks and thus obviate the necessity of a new trial.' (*Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 320 (*Sabella*).)" (*Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 148 (*Garcia*).)

"But it is not enough for a party to show attorney misconduct. In order to justify a new trial, the party must demonstrate that the misconduct was prejudicial. (*Cassim, supra,* 33 Cal.4th at p. 800.) As to this issue, a reviewing court makes 'an independent determination as to whether the error was prejudicial.' (*Decker, supra,* 18 Cal.3d at p. 872.) It 'must determine whether it is reasonably probable [that the appellant] would have achieved a more favorable result in the absence of that portion of [attorney conduct] now challenged.' (*Cassim, supra,* at p. 802.) It must examine 'the entire case, including the evidence adduced, the instructions delivered to the jury, and the entirety of [counsel's] argument,' in determining whether misconduct occurred and whether it was sufficiently egregious to cause prejudice. (*Ibid.*) 'Each case must ultimately rest upon a court's view of the overall record, taking into account such factors, inter alia, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control, of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances.' (*Sabella, supra,* 70 Cal.2d at

pp. 320–321, fn. omitted.) '[I]t is only the record as a whole, and not specific phrases out of context, that can reveal the nature and effect of such tactics.' (*Id.* at p. 318.)" (*Garcia, supra*, 204 Cal.App.4th at p. 149.)

B. Collateral Source Rule in Medical Malpractice Actions

The collateral source rule is well-established in California law. "A person who undergoes necessary medical treatment for tortiously caused injuries suffers an economic loss by taking on liability for the costs of treatment. Hence, any reasonable charges for treatment the injured person has paid or, having incurred, still owes the medical provider are recoverable as economic damages. [Citation.] [¶] When, as here, the costs of medical treatment are paid in whole or in part by a third party unconnected to the defendant, the collateral source rule is implicated." (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 551 (*Howell*).)

Under the collateral source rule, an injured party's damages are not reduced by the amount of any payments on behalf of the injured party from an independent source. (*Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6 (*Helfend*).) This rule encourages people to obtain insurance. (*Id.* at p. 10.) "Defendant should not be able to avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to provide himself with insurance." (*Ibid.*) A closely related evidentiary rule prohibits the admission of evidence of compensation from a collateral source. (*Lund v. San Joaquin Valley Railroad* (2003) 31 Cal.4th 1, 10.)

It follows from the collateral source rule that the injured party is not precluded from recovering the amount that Medi-Cal paid for injury-related medical care and services from the tortfeasor. (*Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 639-640 (*Hanif*).) "For purposes of analysis, plaintiff is deemed to have personally paid or incurred liability for these services and is entitled to recompense accordingly. This is not unreasonable or unfair in light of Medi–Cal's subrogation and judgment lien rights (Welf. & Inst. Code, § 14124.70 et seq.; cf. Gov. Code, § 985, subd. (f)(1), added by

Stats. 1987, ch. 1201, § 25). (See [*Helfend, supra,*] 2 Cal.3d at pp. 10–11[.])" (*Hanif, supra,* at p. 640.)

In response to a medical malpractice insurance crisis in California, the Legislature adopted the Medical Injury Compensation Reform Act of 1975 (MICRA), including Civil Code section 3333.1. (*Barme v. Wood* (1984) 37 Cal.3d 174, 178–179.)[2] Section 3333.1 alters the collateral source rule in medical malpractice cases.[3] A medical malpractice defendant may introduce evidence of "any amount payable as a benefit to the plaintiff as a result of the injury pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services." (§ 3333.1, subd. (a).) If the medical malpractice defendant introduces evidence of the plaintiff's collateral source benefits, the plaintiff may introduce evidence of any payments made to obtain the benefits. (*Ibid.*)

When evidence of collateral benefits is introduced pursuant to section 3333.1, subdivision (a), the source of the collateral benefits is not allowed to recover any amount

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2 All further statutory references are to the Civil Code, unless otherwise stated.

3 Section 3333.1 provides: "(a) In the event the defendant so elects, in an action for personal injury against a health care provider based upon professional negligence, he may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services. Where the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence. [¶] (b) No source of collateral benefits introduced pursuant to subdivision (a) shall recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant."

from the plaintiff and is not subrogated to the plaintiff's rights against the defendant. (§ 3333.1, subd. (b).) The trier of fact is not required to deduct collateral source benefits from damages, but section 3333.1 allows evidence of collateral benefits to be introduced at trial and the trier of fact may determine how the evidence should affect damages. (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 164-165 & fn. 21.)

However, section 3333.1 does not apply to payments made on behalf of an injured party by Medi–Cal (Welf. & Inst. Code, § 14000 et seq.). (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 506.) "Medi–Cal is California's implementation of the federal Medicaid program. [Citation.]" (*Howell, supra,* 52 Cal.4th at p. 553.) In *Brown v. Stewart* (1982) 129 Cal.App.3d 331, 341, the court found that applying section 3333.1 to Medicaid payments for medical services would create a direct conflict with provisions of federal law that require states to seek reimbursement of Medicaid payments from third party tortfeasors. Therefore, the collateral source rule continues to apply in medical malpractice cases in California as to Medi-Cal or Medicaid payments.

C. Attorney Misconduct

Plaintiffs contend Carillo's attorney's statements during closing argument about Medi-Cal and Medicaid payments constituted attorney misconduct. We agree.

The parties stipulated that the amount of Kimi's medical expenses paid on her behalf by Medi-Cal and Medicaid were reasonable. The collateral source rule clearly barred Carillo from arguing that the amount should not be awarded to plaintiffs because the expenses were paid by a third party. Well-established California law prevented Carillo from making such an argument. In an abundance of caution, plaintiffs obtained an order from the trial court prior to argument prohibiting Carillo from arguing that someone other than plaintiffs was entitled to reimbursement for Kimi's medical expenses.

Carillo attempted to circumvent the trial court's order to make his point: "I am not arguing that someone else is entitled to the damages, the expenses that plaintiffs claim

were paid by Medi-Cal or the State of Oregon." Although phrased in the negative, Carillo brought to the jury's attention that someone else was entitled to receive the damages, because they were not paid by Kimi. When plaintiffs objected, the court informed Carillo's attorney that his argument violated the court's order and then attempted to admonish the jury. Carillo's attorney interrupted the admonition with additional argument to further emphasize that Kimi had not paid for insurance or her medical expenses. Carillo's attorney repeated statements to the jury that plaintiffs had not paid and would not owe money for Kimi's medical expenses violated well-established law and the court's order concerning the collateral source payments.

D. Prejudice

Plaintiffs contend the misconduct was prejudicial. We review the entire record to determine whether the misconduct was prejudicial.

1. General Law

"'[The] improper revelation of strongly prejudicial information from outside the record, such as the defendant having compromised with a third party to an accident [citation], or the defendant being insured [citation], can, under some circumstances, alone require reversal. Nevertheless, that [a few] instance[s] of attorney misconduct during closing argument could, standing alone, theoretically justify reversal does not mean [defendant's] arguments rose to this level.' (*Cassim, supra,* 33 Cal.4th at p. 803.) '[I]t is only the record as a whole, and not specific phrases out of context, that can reveal the nature and effect of such tactics.' (*Sabella, supra,* 70 Cal.2d at p. 318.) 'Certainly it is not and should not be the law that in every case a reference to the financial ability of the defendant to respond in damages and arguments based thereon may [or may not] be cured by an admonition. Obviously the effect of an admonition upon such misconduct depends

upon the facts of each case.' (*Hoffman v. Brandt* (1966) 65 Cal.2d 549, 555 . . . .)" (*Garcia, supra,* 204 Cal.App.4th at p. 159.)

Our Supreme Court has stated: "The potentially prejudicial impact of evidence that a personal injury plaintiff received collateral insurance payments varies little from case to case. Even with cautionary instructions, there is substantial danger that the jurors will take the evidence into account in assessing the damages to be awarded to an injured plaintiff." (*Hrnjak v. Graymar, Inc.* (1971) 4 Cal.3d 725, 732-733.) "Even if the jurors do not actually deduct the collateral insurance receipts from the amount of damages they would otherwise award, knowledge of the receipts may 'irretrievably upset the complex, delicate, and somewhat indefinable calculations which result in the normal jury verdict.' [Citation.]" (*Id.* at pp. 732-733, fn. 4.)

In this case, plaintiffs objected to Carillo's argument and requested the trial court admonish the jury. Carillo's attorney prevented an effective admonition and compounded the issue with additional improper argument. The implication of his argument was clear: plaintiffs did not owe any money for Kimi's expenses, because Medi-Cal and Medicaid paid for her care, and therefore, any award to plaintiffs would be a windfall. The majority of the damages were the amounts paid by Medi-Cal and Oregon's Medicaid program. The amounts that plaintiffs paid personally covered incidentals, such as slippers, pillows, and cat care. In light of the ongoing national debate over rising healthcare costs, it is not unreasonable to assume that a claim for expenses by people who did not purchase insurance or pay for medical expenses would engender strong emotions.

2. Admissibility of Juror Declarations

Plaintiffs also contend that the trial court erroneously excluded juror statements necessary to demonstrate that attorney misconduct was prejudicial. We agree that the statements are admissible.

"In 1969, our Supreme Court held that juror affidavits are admissible under Evidence Code section 1150 to establish jury misconduct that warrants the grant of a new trial. (*People v. Hutchinson* (1969) 71 Cal.2d 342, 350–351.) 'Admission of jurors' affidavits within the limits set by [Evidence Code] section 1150 protects the stability of verdicts, and allows proof by the best evidence of misconduct on the part of either jurors or third parties that should be exposed, misconduct upon which no verdict should be based. (See Pen. Code, § 1181; Code Civ. Proc., § 657.)" (*People v. Bryant* (2011) 191 Cal.App.4th 1457, 1467, fn. omitted.)

"Under Evidence Code section 1150, subdivision (a), 'jurors may testify to "overt acts"—that is, such statements, conduct, conditions, or events as are "open to sight, hearing, and the other senses and thus subject to corroboration"—but may not testify to "the subjective reasoning processes of the individual juror . . . ." [Citation.] [¶] Among the overt acts that are admissible and to which jurors are competent to testify are statements [of jurors]. [Evidence Code s]ection 1150, subdivision (a), expressly allows proof of "statements made . . . either within or without the jury room . . . ."' (*In re Stankewitz* (1985) 40 Cal.3d 391, 398.)" (*People v. Engstrom* (2011) 201 Cal.App.4th 174, 183-184.)

"'Evidence of jurors' internal thought processes is inadmissible to impeach a verdict. [Citations.] Only evidence as to objectively ascertainable statements, conduct, conditions, or events is admissible to impeach a verdict. [Citations.] Juror declarations are admissible to the extent that they describe overt acts constituting jury misconduct, but they are inadmissible to the extent that they describe the effect of any event on a juror's subjective reasoning process. [Citation.] Accordingly, juror declarations are inadmissible to the extent that they purport to describe the jurors' understanding of the instructions or how they arrived at their verdict. [Citations.]' [Citation.]" (*Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 349.)

The statements attributed to Therriault are external, verifiable statements that are admissible under Evidence Code section 1150. Murdock and Heckethorn declared that Therriault repeatedly and emphatically stated: "This case is the reason why my insurance

rates are so high!" Other jurors agreed with his statement, including Brown. Cimo approached Heckethorn in the hallway and said, "This case is all about insurance, and this case is the reason that insurance rates are so high. I will not vote for anything that will raise my insurance rates." Therriault and Brown commented in deliberations that the "kids did not owe that money," referring to the medical bills paid by the state programs, and other jurors agreed with them. These objectively ascertainable statements are admissible and relevant under Evidence Code section 1150 as evidence of impermissible comments concerning collateral sources.

The juror declarations submitted by Carillo state that the jury never discussed that medical care costs were paid by Medi-Cal and Medicaid. However, even Carillo's juror declarations admit that Therriault made a comment about his insurance after deliberations concluded. They also do not contradict Cimo's statement to Heckethorn about insurance.

Because the trial court excluded nearly all of the statements in Murdock and Heckethorn's declarations, the court never made any factual determination about the credibility of the opposing declarations. Over the course of the trial, plaintiffs provided strong expert testimony that Kimi was extubated too early, which caused her aspiration and resulting injuries. Monitor strips would have provided objective evidence of Kimi's vital signs during critical times, but the evidence of what happened to the monitor records was hopelessly, suspiciously, confused. The parties presented conflicting evidence about whether certain statements were made during jury deliberations. We direct the trial court to evaluate the juror declarations and examine the entire record in connection with the motion for a new trial to determine whether there is a reasonable probability that the plaintiffs would have achieved a better outcome in the absence of Carillo's closing argument concerning medical expenses.

DISPOSITION

The order denying the motion for a new trial is reversed. The trial court is directed to rule on the motion for a new trial in accordance with the conclusions of this opinion. On remand, if the motion for new trial is denied, then the judgment stands. If the motion for new trial is granted, then the trial court shall vacate the judgment and proceed with a new trial. Appellants Elissa Jhunjhnuwala, Jason Nowland, Brandy Ascough, and Brian Ascough are awarded their costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

KUMAR, J.*

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* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.